No 614

JAN 2 1937

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1936.

MAX SONZINSKY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

HAROLD J. BANDY,
Granite City, Illinois,
JOHN M. KARNS,
East St. Louis, Illinois,
Counsel for Petitioner.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

INDEX.

	Page
Petition for writ of certiorari	1–11
Opinion below	2
Jurisdiction	2
Questions presented	2
Constitutional and statutory provisions involved	3
The indictment	3
The sentence	4
The facts	4
Prayer for writ	11
Supporting brief	12–16
Appendix—Constitutional and statutory provisions involved	17–18

Cases Cited.

A. L. A. Schechter Poultry Corp. v. United States, 55 S. Ct. Rep. 837	14
Applebaum v. United States (C. C. A. Ill.), 274 Fed. 43	15
Carter v. Carter Coal Co. (U. S. Sup.), 80 L. Ed. 749, at page 759	12, 13
Degnan v. United States (C. C. A. N. Y.), 271 F. 291	15
Miles v. United States, 103 U. S. 304, 26 L. ed. 481	15
United States v. Butler, 80 L. ed. 287, at 292	13

Statutes Cited.

Constitution of the United States:	
Sixth Amendment	18
Tenth Amendment	13, 18
Judicial Code, Sec. 240 (a), as amended by Act of February 13, 1925	2
National Firearms Act, 26 U. S. C. A., Sec. 1132-1132q	2, 17, 18

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1936.

MAX SONZINSKY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Max Sonzinsky, by Harold J. Bandy and John M. Karns, his counsel, and petitions this Honorable Court to grant the writ of certiorari directed to the Honorable, the Judges of the United States Circuit Court of Appeals for the Seventh Circuit, requiring said court to certify to this Honorable Court, for review and determina-

tion, a cause lately pending in said Circuit Court of Appeals wherein petitioner was appellant, and respondent United States of America was appellee. Petitioner tenders herewith his petition, supporting brief, and a certified copy of the entire record in the cause, together with ten copies of the record as printed below, as required by 38 (7) of the rules of this Honorable Court.

OPINION BELOW.

The opinion of the Circuit Court of Appeals was filed November 9, 1936. Petition for rehearing was denied December 2, 1936.

JURISDICTION.

Petitioner seeks to invoke the jurisdiction of this Honorable Court under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

The statute which petitioner is charged with having violated ("National Firearms Act," 26 U. S. C. A., Sec. 1132-1132q, enacted June 26, 1934) has not previously been before this Honorable Court.

Whether this statute is constitutional is a question of public importance that deserves the attention of, and should be passed upon by, this Honorable Court.

QUESTIONS PRESENTED.

(a) Whether Section 2 of the "National Firearms Act" invades the powers specifically reserved to the individual states by the Constitution.

(b) Whether there is ANY evidence in this record to

prove, or reasonably to raise the inference, that petitioner was a dealer in firearms within the limitations of said Section 2, and whether there is any evidence proving that petitioner sold a weapon of the kind defined in Section 1 of the Act.

(c) Whether count one of the indictment sufficiently charges a violation of Section 2 of the National Firearms Act, when subjected to demurrer.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The constitutional and statutory provisions involved are set forth in the appendix, infra, pp. 17-18.

THE INDICTMENT.

The indictment originally consisted of four counts, but the District Court withdrew counts three and four from the jury, finding petitioner not guilty on those counts, and submitted the case upon the first and second counts.

The first count charges that, "on or about the 9th day of April, A. D. 1936, at or near East St. Louis, in the State of Illinois and in the Eastern District of Illinois and within the jurisdiction of this court and within the Eighth Internal Collection District of Illinois," the defendant did "unlawfully, knowingly, fraudulently and feloniously carry on the business of a dealer in firearms at 453 Collinsville avenue, East St. Louis, aforesaid, without having paid the special tax therefor, as required by virtue of Section 1132a of the United States Code Annotated."

The second count alleges that on the date and at the place above described the defendant "did unlawfully,

knowingly and feloniously receive and have in his possession a certain firearm, to wit, one (1) sawed-off shotgun with a fifteen and seven-eighths inch barrel, a more particular description being to the grand jurors unknown, which said firearm had come into his possession not in pursuance of a written order from the said Max Sonzinsky on application upon a blank, in duplicate, issued by the Commissioner of Internal Revenue."

Petitioner was convicted upon both counts of the indictment (R. pp. 10 and 11).

THE SENTENCE.

Upon the first count of the indictment petitioner was sentenced to eighteen months of imprisonment in the United States penitentiary at Leavenworth, Kansas (R. 11). Upon count 2 the Court sentenced him to serve eighteen months in the same penitentiary, and to pay a fine of five hundred dollars. The judgment also provided that the prison sentences upon the two counts should be served concurrently (R. 11).

The Court of Appeals reversed the judgment upon count 2, but affirmed it upon count 1. Petitioner now stands convicted upon only one count of the indictment. The first count is the only part of the indictment with which we are concerned in this application for the writ of certiorari.

THE FACTS.

Wesley Le Grand (R. 14) and John Dowling (R. 16) testified as witnesses for the Government that they visited a store at 453 Collinsville avenue, East St. Louis, on the afternoon of April 9, 1936, for the purpose of buying a

double-barrel shotgun. Le Grand testified that "it was a hardware store where they sold hot water heaters for automobiles, tools and things carried in hardware stores, guns, light fixtures" (R. 14-15). He testified, further, that petitioner exhibited several double-barrel shotguns, but that he examined them and they were not satisfactory; that petitioner then asked him if he would be interested in a "sawed-off pump gun, a Winchester" (R. 15). Le Grand then testified as follows:

> "He told Dowling and myself to step outside and sit in the machine and he would call us when it was ready in about five minutes. We went outside and sat in the machine. Mr. Sonzinsky came to the door and motioned us to come in. The gun was unassembled, wrapped in newspaper. He told me to look at it. I put the gun together, worked it a few times. It worked all right. He told me he wanted $10.00 for the gun. In my estimation a new gun of that type is worth around $35.00. I put the gun together. When Max called me in the gun was unassembled, and wrapped in a newspaper, tied with a string. I untied it. Dowling and I looked at it. I told him the gun was worth $10.00 all right, it was brand new. He guaranteed it to be in perfect order. I bought it" (R. 15).

Dowling's testimony was practically the same.

Le Grand identified the gun (R. 15). It was admitted in evidence as Government's Exhibit A.

Gilbert Hart, a special agent of the Intelligence Bureau, Department of Internal Revenue of the United States Government, testified as follows concerning Government's Exhibit A: "I have made an accurate measurement of the length of the barrel of the sawed-off shotgun, marked 'Government's Exhibit A.' It is fifteen and five-eighths inches" (R. 19).

Section 1 (a) of the National Firearms Act provides that: "The term 'firearm' means a shotgun or rifle having a barrel of less than eighteen inches in length, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person."

Neither Le Grand nor Dowling testified that petitioner owned or operated the store in which they purchased the gun. Neither witness testified to facts that would constitute him the proprietor or a **dealer.** The only testimony that even remotely bears upon this important question is the following from the testimony of Le Grand: "I would say I have been in that store twice. I saw a young fellow in there. I don't know who he is. I met the defendant the day I went in to buy the gun. I have seen him in his store before. I cannot explain how I know it was the defendant's store. I don't know exactly how I would explain that. There was not any name on the window. I do not know who owns that store. It is right that I don't know but what the other man in there may have been the proprietor of the store. I have never seen any license issued to that store by the state. It was a sort of general store, handling hardware, furniture and all sorts of things." The controlling effect upon this case of the failure of the Government to prove who owned or operated the store, and the paralyzing blow this absence of proof deals to the conviction of petitioner, is shown by the fact that the only count that remains in the case charges that petitioner did "unlawfully, knowingly, fraudulently and feloniously carry on the business of a dealer in firearms * * * without having paid the special tax, as required by virtue of Section 1132a of the United States Code Annotated."

Section 1 of the National Firearms Act defines a

weapon that is subject to its restrictions to be a shotgun (or rifle), having a barrel less than eighteen inches in length, **"from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person"** (U. S. C. A., Title 26, Sec. 1132a).

There is no word of proof, no suggestion, in this record that, (a) the gun sold by petitioner is one from which a "shot is discharged by an explosive," or that (b) it is "capable of being concealed on the person."

The record in this case leaves the following vitally essential elements of the alleged offense to conjecture:

1. That petitioner was a dealer in the kind of firearms defined in the act.

2. That the gun sold by petitioner is one from which "a shot is discharged by an explosive."

3. That the gun sold by petitioner is one that "is capable of being concealed on the person."

It is fundamental that every element of a statutory offense must be proved by positive evidence or by evidence from which the fact can be reasonably inferred; that no conviction that deprives a citizen of his liberty can be predicated on imagination or conjecture; that a total failure to prove any vital element of the offense is fatal to the conviction and requires a reversal of the judgment.

The evidence in this record proves the making of only one sale by petitioner. It is respectfully contended by petitioner that proof of one sale does not establish the allegation that one is a dealer in firearms. The facts in this record disclose one sale of one weapon, and do not show that petitioner ever possessed, sold or attempted to sell any other weapon defined by the National Firearms Act. The learned trial judge, in his charge, took cog-

nizance of the fact that one must sell more than one firearm in order to be a dealer as defined in the Act. The charge said, in part: "If you believe that this sale of the firearm in question here—if you believe Max Sonzinsky did sell this firearm—and if you should believe that sale was a single incident and that he had no other business of that character, then you would not be authorized, the way this statute is drawn, to find him guilty of being a dealer contrary to the provisions of the statute, but if under the circumstances of this case, you should believe this is not a sole transaction, but this is a transaction which is similar to other transactions of the same kind he is carrying on there in connection with the hardware business in that place, * * * then you should find he is a dealer as described in the statute" (R. 23).

Prior to pleading not guilty, petitioner filed a demurrer to the indictment (R. 9-10). The demurrer was overruled (R. 6). The seventh ground for demurrer was that: "Count one (1) of said indictment does not allege a violation of the said statute." This assignment was repeated as ground 7 in the "Notice of Appeal" (R. 30). And the first sentence in petitioner's assignment of errors alleges that "the trial court erred in overruling this appellant's demurrer to the indictment."

Although not directly passing upon the demurrer's challenge to the sufficiency of the first count of the indictment, the opinion of the Court of Appeals is apparently based upon the conclusion that the count properly alleges a violation of Section 2 of the Act.

Petitioner contends that count one is defective because it fails to describe the kind of weapons handled by petitioner to constitute him a person who unlawfully, knowingly, fraudulently and feloniously carried on the business of a dealer in firearms without having paid the special tax

therefor. Petitioner respectfully contends that the bare averment that he was a dealer in firearms, without describing them, and without alleging that they were the kind of firearms defined in Section 1 of the Act, constitutes the bare and unjustified conclusion of the pleader; that this bare allegation fails to meet the requirements of Section 6 of the Constitution in that it wholly omits to inform petitioner of the nature and cause of the accusation. Count one does not allege that petitioner, as a dealer, possessed, handled or sold shotguns or rifles or other weapons with barrels of less than eighteen inches in length, or that the weapons he dealt in were guns from which a shot is discharged by an explosive, or that they could be concealed on the person. Moreover, the count was also defective because, instead of charging that petitioner operated as a dealer in firearms within the Eighth Internal Revenue District of Illinois, it alleges that he acted as such dealer within the "Eighth Internal Collection District of Illinois" (R. 3).

In addition to the foregoing, petitioner respectfully but earnestly contends that count one (which charges a violation of Section 2 of the Act) is fatally defective because it fails to charge that petitioner unlawfully failed and omitted to "register with the Collector of Internal Revenue" for the Eighth Internal Revenue District of Illinois. The count merely charges carrying on the business of a dealer in firearms "without having paid the special tax therefor" (R. 3). Section 2 of the Act provides that: "Within fifteen days after the thirtieth day after June 26, 1934, or upon first engaging in business, and thereafter on or before the 1st day of July of each year, every importer, manufacturer and dealer in firearms shall register with the collector of internal revenue for each district in which such business is to be carried on his name or style,

principal place of business, and places of business in such district, AND pay a special tax at the following rates," etc. (U. S. C. A., Title 26, Sec. 1132a). The statute is not in the alternative or disjunctive. **Both elements set forth in the section must be alleged and proved.** The prosecution recognized the fact that it was necessary to prove that petitioner failed to register. Its witness L. J. Wahl, a clerk in the Internal Revenue Department at Springfield, Illinois, testified as follows: "Max Sonzinsky is not registered in my office as a dealer in firearms. There is no one registered from 453 Collinsville avenue, East St. Louis" (R. 18). It was just as necessary to allege this as it was to prove it. The failure to register is a necessary part of the offense.

Petitioner respectfully submits that the ruling of the trial court in overruling his demurrer constituted reversible error; that it deprived petitioner of his right to be informed of the nature and cause of the accusation; that the overruling of the demurer to count 1 of the indictment forced petitioner to go to trial and to be convicted upon a count that did not state any offense as defined by the National Firearms Act.

Petitioner has attempted to adhere to the rule of this Honorable Court that a petition for certiorari must not contain argument, but, if he has transgressed the rule in any respect, it was in order to show that he has been adjudged guilty of a crime, and is to be deprived of his liberty and committed to prison, upon an indictment that does not charge him with violation of any of the penal laws of the United States, and upon evidence that does not establish the insufficient allegations of the indictment. It has always been the policy of this Honorable Court that, although it will not disturb the verdict of a jury and the judgment of a court that is based upon conflicting evi-

dence, even when the proof for the prosecution is weak, it will never hesitate to set aside a conviction in a case in which there is no evidence whatever to support it.

Wherefore, your petitioner humbly prays that your Honors will order the writ of certiorari to issue.

Respectfully submitted,

MAX SONZINSKY,
Petitioner.

HAROLD J. BANDY,
Granite City, Illinois,

JOHN M. KARNS,
East St. Louis, Illinois,
Attorneys for Petitioner.

SUPPORTING BRIEF.

1.

The National Firearms Act merely pretends to be a revenue measure. It is, in reality, a police measure. Its purpose is to suppress the sale of certain kinds of firearms and to punish violators. A mere reading of the act establishes this fact beyond hope of contradiction. The purpose of Congress in enacting this law was undoubtedly a good one, and one that took into consideration the welfare of society, but beneficent aims, however great or well directed, can never serve in lieu of constitutional power.

Carter v. Carter Coal Co. (U. S. Sup.), 80 L. Ed. 749, at page 759.

2.

"It is an established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted. * * * The power of taxation, which is expressly granted, may, of course, be adopted as a means to carry into operation another power also expressly granted. But resort to the taxing power to effectuate an end which is not legitimate, not within the scope of the Constitution, is obviously inadmissible."

U. S. v. Butler, 80 L. Ed. 287.

As further stated in the above case of U. S. v. Butler, recently decided by your Honors, "The exaction cannot be wrested out of its setting, denominated an excise for raising revenue and legalized by ignoring its purpose as a mere instrumentality for bringing about a desired end."

3.

There can be no doubt that the purpose that inspired the passage of this law was praiseworthy; that the law was conceived as a means to suppress crime and protect society. But giving all credit to the noble aims that inspired the passage of the act, and the salutary features of the law, we cannot escape the fact that it is a police measure, and that the jurisdiction of legislation of this kind is confined to the states. "Nothing is more certain than that beneficent aims, however great or well directed, can never serve in lieu of constitutional power."

Carter v. Carter Coal Co., 80 L. Ed. 749, at page 759.

4.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Tenth Amendment to Constitution.

5.

The prosecution admitted at the trial that the National Firearms Act is a police measure. In his argument to the jury the District Attorney said:

> "Gentlemen of the jury: The purpose of the National Firearms Act is to prevent mass murders and incidents of that kind that may happen" (R. 20).

6.

A tax, in the general understanding of the term, and as used in the Constitution, signifies an exaction for the support of the Government.

United States v. Butler, 80 L. ed. 287, at 292.

7.

The Government will probably argue that the crime wave of recent years has created a critical condition that calls for drastic measures. This does not justify the exercise of unconstitutional power, especially when the same salutary police measure can be constitutionally passed and enforced by each of the individual states.

"Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the National Government are limited by the constitutional grants. * * * Such assertions of extraconstitutional authority were anticipated and excluded by the explicit terms of the Tenth Amendment."

A. L. A. Schechter Poultry Corp. v. United States, 55 S. Ct. Rep. 837.

8.

While it is true that a reviewing court cannot invade the province of the jury by determining questions of credibility, and the weight of conflicting testimony, it is the duty of a reviewing court to review the testimony and reverse the conviction if there is not any evidence whatever to support it. The Court, reviewing a conviction for crime, is limited to the question of whether there is evidence to establish each essential element of the offense charged. If the review of the entire record shows a total absence of proof to establish the existence of any essential

element of the alleged offense, the judgment should be reversed.

> Miles v. United States, 103 U. S. 304, 26 L. ed. 481;
> Degnan v. United States (C. C. A. N. Y.), 271 F. 291;
> Applebaum v. United States (C. C. A. Ill.), 274 Fed. 43.

9.

At the conclusion of the Government's evidence, and again at the conclusion of all the evidence in the case, the petitioner requested the Court to direct the jury to find him not guilty. The request was in these words:

> "Now comes the defendant, at the close of the Government's evidence, and asks the Court to direct the jury to find him not guilty upon the entire indictment" (R. 19).

This request was refused. In his notice of appeal petitioner then assigned the following alleged error as assignment No. 16:

> ~~"The Court erred in reviewing the request of the~~
> "The Court erred in denying the request of the defendant for a directed verdict of not guilty, which request was made at the close of the Government's evidence and renewed at the close of all the evidence" (R. 30-31).

Petitioner's request to the trial court for a directed verdict of not guilty presented the question of law of whether there was any evidence before the jury to prove every essential element of the crime charged in count I of the indictment. The assignment in his notice of appeal in the form of an allegation that the refusal of the trial court to direct a verdict of not guilty constituted error preserved this question of law for review.

10.

Proof of a single sale is not sufficient to raise the inference that petitioner is a dealer in firearms as defined and contemplated by the provisions of the National Firearms Act.

Respectfully submitted,

HAROLD J. BANDY,
Hogan Building,
Granite City, Illinois,
JOHN M. KARNS,
Spivey Building,
East St. Louis, Illinois,
Attorneys for Petitioner.

APPENDIX.

The following are the sections of the National Firearms Act which apply to this case:

Paragraph "A" of Section 1 (U. S. C. A., Title 26, Section 1132a):

> "The term 'firearm' means a shotgun or rifle having a barrel of less than eighteen inches in length, or any other weapon, except a pistol or revolver, from which a shot is discharged by an explosive if such weapon is capable of being concealed on the person, or a machine gun, and includes a muffler or silencer for any firearm, whether or not such firearm is included within the foregoing definition."

Section 2 (U. S. C. A., Section 1132a, Title 26, "a"):

> "Within fifteen days after the thirtieth day after June 26, 1934, or upon first engaging in business, and thereafter on or before the 1st day of July of each year, every importer, manufacturer and dealer in firearms shall register with the collector of internal revenue for each district in which such business is to be carried on his name or style, principal place of business, and places of business in such district, and pay a special tax at the following rates: Importers or manufacturers, $500 a year; dealers, other than pawnbrokers, $200 a year; pawnbrokers, $300 a year. Where the tax is payable on the 1st day of July in any year it shall be computed for one year; where the tax is payable on any other day it shall be computed proportionately from the 1st day of the month in which the liability to the tax accrued to the 1st day of July following."

Section 14 (U. S. C. A., Title 26, Section 1132m):

> "Any person who violates or fails to comply with any of the requirements of sections 1132 to 1132q shall, upon conviction, be fined not more than $2,000 or be imprisoned for not more than five years, or both, in the discretion of the court (June 26, 1934, c. 757, Section 14, 48 Stat. 1240)."

The Tenth amendment to the Constitution of the United States provides that:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are preserved to the States respectively, and to the people."

The Sixth amendment to the Constitution of the United States provides:

> "In all criminal cases, the ~~United States~~ accused shall enjoy the right * * * to be informed of the nature and cause of the accusation."